SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1968

NO. 109

MARGARET E. SNYDER, Also Known as PEG SNYDER, Petitioner,

vs.

CHARLES HARRIS and EARL W. KIRCHHOFF, Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX.

DOCKET ENTRIES IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

1966

Nov. 23 Complaint filed. Summons issued directed to (3) Defendants returnable within 20 days after service.

Dec. 6 Marshal's return on summons filed. Defendant National Western Life Insurance Company ex. 11/30/66.

Dec. 16 Motion of Defendant, National Western Life Ins. Co., to dismiss filed.

Dec. 20 Designation of local counsel filed by Benjamin E. Pickering of Newman and Pickering, Attorneys at Law, Dallas, Texas. Consent to act as local counsel filed by F. William McCalpin of Lewis, Rice, Tucker, Allen & Chubb, 1555 Railway Ex. Building, 611 Olive Street, St. Louis, Mo.

Dec. 29 Marshal's return on summons filed. Dft. Charles Harris ex. 12/17/66.

Marshal's return on summons filed. Dft. Earl W. Kirchhoff, ex. 12/20/66.

1967

Jan. 6 By leave of Court and on application of defendants, Charles Harris and Earl W. Kirchhoff, defendants granted to and including January 26, 1967, within which to file motions or to plead to Plaintiff's complaint in memo. filed. (RWH,

J.) Morris A. Shenker, Attorney at Law, St. Louis, Mo., attorney for defendants.

Jan. 13 Submission of motion to dismiss of defendant, National Life Insurance Company vacated and said motion docketed for hearing in St. Louis on next regular motion docket of Court 1.

Jan. 25 Separate motions of defendants, Earl W. Kirchhoff and Charles Harris to dismiss, filed. Oral argument requested.

Feb. 3 Motion of Defendant, National Western Life Ins. Co., to dismiss argued and submitted. Motions (2) of Defendants, Harris and Kirchhoff to dismiss are passed to next motion Docket (RWH J.)

Feb. 24 Order filed. Separate motion of Defendant, National Western Life Insurance Company for failure to state cause of action is sustained and Plaintiff granted 20 days to file amended pleadings as to said Defendant. That part of the motion seeking to quash the return of service is sustained and the service is quashed. Copy of order mailed to Hyman G. Stein, F. Wm. McCalpin and Benjamin E. Pickering.

Mar. 14 Amendment complaint filed.

Mar. 22 Transcript of proceedings held Feb. 3, 1967, filed by Official Court Reporter Olive Poole. Transcript retained in St. Louis, Missouri.

Mar. 27 Motion of Defendants, Earl W. Kirchhoff and Charles Harris to dismiss amended complaint filed. Supporting brief filed.

Mar. 29 By leave, Plaintiff granted to April 5, 1967 to file reply memo.

Apr. 5 Plaintiff's memo. in opposition to Defendants' motion to dismiss filed.

Apr. 7 Separate motions of Defendants Harris and Kerchhoff to dismiss, are argued and submitted.

Cause set for trial in Cape Girardeau, Mo., Monday, May 15, 1967.

Apr. 13 Cause dismissed without prejudice as to Defendant, National Western Life Insurance Company, in order filed.

Apr. 25 Copy of Notice to take depositions of Defendants filed.

Apr. 26 Copy of Notice to take deposition of Charles Harris and Earl W. Kirchhoff, filed.

Apr. 27 Memo. opinion and order sustaining Defendants' motion to dismiss and dismissing cause without prejudice filed. Attest—copy of order mailed to Stein and Siegel, Attorneys at Law, International Building, 722 Chestnut St., St. Louis, Mo., and Morris A. Shenker, Attorney at Law, 408 Olive Street, St. Louis, Mo. (Harper, J.)

May 25 Plaintiff's Notice of Appeal to the United States Court of Appeals for the Eighth Circuit filed.

Attested copy of Notice of Appeal mailed to Morris A. Shenker, Attorney at Law, 408 Olive St., St. Louis, Mo. Appeal bond in the sum of $250.00 filed.

DOCKET ENTRIES IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Date	Filings—Proceedings.
1967	
June 9	Docketing case.
June 9	Certified copies of Notice of Appeal and of Docket Entries in U. S. District Court.
June 9	Appearance for appellant.
June 9	Copy record for printing.
June 13	Appearance for appellees.
June 23	Record printed and filed; preparing record for printer.
June 27	Appearance for appellant.
June 29	Receipted statement of cost of printing record.
July 19	Brief appellant.
July 25	Appearance for appellees.
Aug. 10	Brief appellee.
Aug. 21	Reply Brief appellant.
Dec. 13	Transfer to calendar for Jan. 1968 session.
1968	
Jan. 19	Argued by Mr. Hyman G. Stein for appellant and Mr. James L. Zemelman for appellee.
	Submitted to Judges Van Oosterhout, Matthes and Harris.

Jan. 19 Appearance for appellees.

Feb. 27 Opinion, Per Curiam.

Feb. 27 Judgment: Affirmed.

Mar. 14 Petition for Rehearing, or in alternative Transfer to Court en banc.

Mar. 22 Order: Petition appellant for rehearing or in alternative transfer to court en banc-denied.

Mar. 27 Motion appellant for stay of issuance of mandate.

Mar. 27 Order: Issuance of mandate stayed to and including May 1, 1968, on motion.

Apr. 25 Motion appellant for further stay of mandate.

Apr. 25 Order: Issuance of mandate further stayed to and including May 20, 1968, pending proceedings in Supreme Court, U. S., re writ of certiorari, etc., on motion appellant.

May 7 Prepare transcript for Supreme Court, U. S.

May 27 Evidence of docketing of case in Supreme Court.

Oct. 24 Order of Supreme Court, U. S., allowing certiorari.

RECORD.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT.

No. 18,881.
CIVIL.

MARGARET E. SNYDER, ALSO KNOWN AS PEG SNYDER,
APPELLANT,
vs.
CHARLES HARRIS AND EARL W. KIRCHHOFF,
APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

In the United States District Court,
Eastern District of Missouri,
Southeastern Division.

Margaret E. Snyder, also known as Peg Snyder, Plaintiff,
vs.
Charles Harris (Cape Girardeau, Missouri),
Earl W. Kirchhoff (Cape Girardeau, Missouri),
and
National Western Life Insurance Company, a corporation,
Defendants.

Cause No. S66C78.

COMPLAINT.

(Filed in U. S. District Court on Nov. 23, 1966.)

Plaintiff states that:

1. At all times herein mentioned Plaintiff was and is a resident and citizen of the State of Arizona.

2. Defendant Charles Harris is a resident and citizen of the State of Missouri and more particularly resides in the City of Cape Girardeau, Missouri.

3. Defendant Earl W. Kirchhoff is a resident and citizen of the State of Missouri and more particularly resides in the City of Cape Girardeau, Missouri.

4. Defendant National Western Life Insurance Company (hereinafter sometimes called and referred to as "National Western") is a corporation organized and existing under the laws of the State of Colorado.

5. Missouri Fidelity/Union Trust Life Insurance Company (hereinafter sometimes called and referred to as "Missouri Fidelity") at the times herein mentioned was and is a corporation and engaged in the business of selling life insurance and issuing and selling policies of life insurance.

6. The amount involved in controversy herein is in excess of Ten Thousand Dollars ($10,000.00) exclusive of cost and interest and there is a diversity of citizenship between Plaintiff and the Defendants and this Court accordingly has jurisdiction of this cause.

7. At all times herein mentioned and for a long time prior to November 22, 1966, Plaintiff was and still is a shareholder of and in Missouri Fidelity and the owner of two thousand (2,000) shares of said Missouri Fidelity.

8. The By-laws of Missouri Fidelity provide for a Board of Directors consisting of fifteen (15) directors.

9. At the times herein mentioned and complained of Defendants Charles Harris and Earl W. Kirchhoff were each a director of Missouri Fidelity.

10. At the times herein mentioned and complained of the market price of Missouri Fidelity was about $2.63 per share.

11. Sometime prior to November 22, 1966, Defendant National Western submitted to directors of Missouri Fidelity a proposal to purchase from them for $7.00 per share all the shares of Missouri Fidelity owned by them, conditioned, however, that all directors of Missouri Fidelity except four of their number resign as such directors and that five nominees of Defendant National Western be elected as directors of Missouri Fidelity and that such nominees be designated and named as a majority of the executive committee and of the investment committee of Missouri Fidelity.

12. On or about November 22, 1966, Defendant National Western pursuant to its said offer entered into an agreement with eight of the directors of Missouri Fidelity included among whom were Defendants Charles Harris and Earl W. Kirchhoff to pay to them and to friends and relatives of theirs $7.00 per share for an aggregate of approximately 300,000 shares of Missouri Fidelity owned by them, and thereupon and in pursuance of such conduct said eight directors including Defendants Charles Harris and Earl W. Kirchhoff did resign as directors of Missouri Fidelity. Four of the directors of Missouri Fidelity did not participate towards the effectuation of the acts aforesaid and did not resign and three directors who also did not participate in the effectuation of the aforesaid acts did resign.

13. The aforesaid transactions and acts and resignations occurred at and as a part of a meeting of the Board of Directors of Missouri Fidelity with Defendants Charles Harris and Earl W. Kirchhoff participating therein and with Defendant National Western by and through its agents and representatives participating therein in the County of St. Louis, Missouri, and at such meeting of directors and as such resignations were tendered five nominees of Defendant National Western were elected directors in lieu of the resigning directors.

14. The aforesaid conduct and acts of said eight directors including Defendants Charles Harris and Earl W. Kirchhoff who agreed to sell their shares and who resigned as aforesaid were a breach of trust and a violation of their duties as directors of Missouri Fidelity and Defendant National Western wrongfully and in violation of the rights of Plaintiff and other shareholders of Missouri Fidelity similarly situated, procured said resignations and therefor paid or has agreed to pay the said eight directors who resigned, including Defendants Charles Harris and Earl W. Kirchhoff and their friends and relatives as aforesaid a premium of about $1,200,000.

15. The aggregate amount paid by Defendant National Western for said shares purchased by it as aforesaid was approximately $1,200,000 in excess of the market value of said shares and was a premium paid by it to said selling shareholders for the resignations of said directors who resigned as aforesaid and for the obtaining control of the executive committee and investment committee of Missouri Fidelity by Defendant National Western as aforesaid. The conduct of Defendant National Western hereinabove set forth was the commission by it of a tort in the State of Missouri and more particularly in St. Louis County, Missouri.

16. Upon information and belief Plaintiff states that the class of shareholders of Missouri Fidelity consists of more than 4,000 persons residing in different states and it would not be practical for all of them to join or be joined in this action and Plaintiff brings this action on behalf of herself and all other shareholders of Missouri Fidelity similarly situated.

17. By reason of the matters aforesaid and the wrongful conduct of Defendant National Western and the eight directors who participated therein as aforesaid the said premium of approximately $1,200,000 should be distributed to Plaintiff and the other shareholders of Missouri

Fidelity similarly situated according to the shares held by them.

Wherefore, Plaintiff prays judgment against the Defendants in the amount of $1,200,000 and that such judgment be entered in favor of Plaintiff and the other shareholders of Missouri Fidelity in accordance with the shares of Missouri Fidelity held by them respectively and for costs herein.

HYMAN G. STEIN,
CHARLES ALAN SEIGEL,
1117 International Building,
722 Chestnut Street,
St. Louis, Missouri 63101,
Telephone: CEntral 1-3443,
Attorneys for Plaintiff.

DEFENDANT CHARLES HARRIS SEPARATE MOTION TO DISMISS.

Oral Argument Requested.

(Filed in U. S. District Court on January 25, 1967.)

The defendant moves the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against this defendant upon which relief can be granted.

2. To dismiss the action on the ground that it purports to constitute a derivative shareholders action pursuant to the provisions of Rule 23.1 of the Federal Rules of Civil Procedure and does not comply with the provisions of said rule in that;

(a) The complaint is not verified.

(b) The complaint fails to set forth that the action is not a collusive one to confer jurisdiction on a Court of the United States which it would not otherwise have.

(c) The complaint fails to allege with particularity the efforts, if any, made by the plaintiff to obtain the action she desires from the directors or other comparable authority.

(d) The complaint fails to allege with particularity the reasons for her failure to obtain the action or for not making the effort.

MORRIS A. SHENKER,
Attorney for Defendant Charles Harris,
408 Olive Street,
St. Louis, Missouri,
CH. 1-6116.

A copy of the foregoing Motion to Dismiss mailed to Hyman G. Stein and Charles Alan Seigel, Attorneys for Plaintiff, 1117 International Bldg., 722 Chestnut Street, St. Louis 1, Missouri this 25 day of Jan., 1967.

JAMES L. ZEMELMAN.

DEFENDANT EARL W. KIRCHOFF SEPARATE MOTION TO DISMISS.

Oral Argument Requested.

(Filed in U. S. District Court on Jan. 25, 1967.)

The defendant moves the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against this defendant upon which relief can be granted.

2. To dismiss the action on the ground that it purports to constitute a derivative shareholders action pursuant to the provisions of Rule 23.1 of the Federal Rules of Civil Procedure and does not comply with the provisions of said rule in that;

(a) The complaint is not verified.

(b) The complaint fails to set forth that the action is not collusive one to confer jurisdiction on a court of the United States which it would not otherwise have.

(c) The complaint fails to allege with particularity the efforts, if any, made by the plaintiff to obtain the action she desires from the directors or other comparable authority.

(d) The complaint fails to allege with particularity the reasons for her failure to obtain the action or for not making the effort.

MORRIS A. SHENKER,
Attorney for Defendant,
Earl W. Kirchoff,
408 Olive Street,
St. Louis 2, Missouri,
CH. 1-6116.

A copy of the foregoing Motion to Dismiss mailed to Hyman G. Stein and Charles Alan Seigel, Attorneys for Plaintiff, 1117 International Bldg., 722 Chestnut Street, St. Louis 1, Missouri, this 25 day of Jan., 1967.

JAMES L. ZEMELMAN.

SUPPLEMENTAL MOTION TO DISMISS OF DEFENDANTS EARL W. KIRCHHOFF AND CHARLES HARRIS.

(Filed in U. S. District Court on February 28, 1967.)

The defendants incorporate by reference their motions heretofore filed and move the Court as to the following supplemental grounds as follows:

1. To dismiss the action because the complaint fails to join as defendants the other six directors referred to in paragraph twelve of the complaint, which directors are indispensable parties under Rule 19 of the Federal Rules of Civil Procedure and are not within the jurisdiction of the Court, and further because the plaintiff has failed to set forth the names of the persons referred to in paragraph twelve of the complaint and the reasons they were not joined, contrary to the provisions of Rule 19 (c) of the Federal Rules of Civil Procedure.

2. To dismiss the action as one pleading a class action, if so for the reasons that:

(a) The person on whose behalf the action purports to be brought do not constitute a class, but on the contrary the interest of many of them are distinct and adverse.

(b) The plaintiff does not adequately represent all the other members of the alleged class, in that the interest of the plaintiff is not identical or co-extensive with the interests of other members of the alleged class, but are different therefrom and adverse thereto, and that certain other members of the alleged class have rights not possessed by the plaintiff.

(c) The claims of the plaintiff are not typical of the claims of all of the members of the alleged class.

MORRIS A. SHENKER,
Attorney for Defendants,
408 Olive Street,
St. Louis 2, Missouri,
CHestnut 1-6116.

In the United States District Court,
Eastern District of Missouri,
Eastern Division.

Margaret E. Snyder, Also Known as Peg Snyder, Plaintiff, vs. Charles Harris and Earl W. Kirchhoff, Defendants.	Cause No. S66 C78.

AMENDED COMPLAINT.

(Filed in U. S. District Court on Mar. 14, 1967.)

Plaintiff states that:

1. At all times herein mentioned Plaintiff was and is a resident and citizen of the State of Arizona.

2. Defendant Charles Harris is a resident and citizen of the State of Missouri and more particularly resides in the City of Cape Girardeau, Missouri.

3. Defendant Earl W. Kirchhoff is a resident and citizen of the State of Missouri and more particularly resides in the City of Cape Girardeau, Missouri.

4. National Western Life Insurance Company (hereinafter sometimes called and referred to as "National Western") is a corporation organized and existing under the laws of the State of Colorado.

5. Missouri Fidelity/Union Trust Life Insurance Company (hereinafter sometimes called and referred to as "Missouri Fidelity") at the times herein mentioned was and is a corporation and engaged in the business of selling life insurance and issuing and selling policies of life insurance.

6. The amount involved in controversy herein is in excess of Ten Thousand Dollars ($10,000.00) exclusive of cost and interest and there is a diversity of citizenship between Plaintiff and the Defendants and this Court accordingly has jurisdiction of this cause.

7. At all times herein mentioned and for a long time prior to November 22, 1966, Plaintiff was and still is a shareholder of and in Missouri Fidelity and the owner of two thousand (2,000) shares of said Missouri Fidelity.

8. The By-Laws of Missouri Fidelity provide for a Board of Directors consisting of fifteen (15) directors.

9. At the times herein mentioned and complained of Defendants Charles Harris and Earl W. Kirchhoff were each a director of Missouri Fidelity.

10. At the times herein mentioned and complained of the market price of Missouri Fidelity was about $2.63 per share.

11. Sometime prior to November 22, 1966, National Western submitted to directors of Missouri Fidelity a proposal to purchase from them for $7.00 per share all the shares of Missouri Fidelity owned by them, conditioned however, that all directors of Missouri Fidelity except four of their number resign as such directors and that five nominees of National Western be elected as directors of Missouri Fidelity and that such nominees be designated, named and elected as directors of Missouri Fidelity and as a majority of the executive committee and of the investment committee of Missouri Fidelity.

12. On or about November 22, 1966, National Western pursuant to its said offer entered into an agreement with eight of the directors of Missouri Fidelity included among whom were Defendant Charles Harris and Earl W. Kirchhoff to pay to them and to friends and relatives of theirs $7.00 per share for an aggregate of approximately 300,000

shares of Missouri Fidelity owned by them, and thereupon and in pursuance of such conduct said eight directors including Defendants Charles Harris and Earl W. Kirchhoff did resign as directors of Missouri Fidelity and nominees of National Western were designated, named and elected as directors of Missouri Fidelity and as a majority of the executive committee and of the investment committee of Missouri Fidelity. Four of the directors of Missouri Fidelity did not participate towards the effectuation of the acts aforesaid and did not resign and three directors who also did not participate in the effectuation of the aforesaid acts did resign.

13. The aforesaid transactions and acts and resignations occurred at and as a part of a meeting of the Board of Directors of Missouri Fidelity with Defendants Charles Harris and Earl W. Kirchhoff participating therein and with National Western by and through its agents and representatives participating therein in the County of St. Louis, Missouri, and at such meeting of directors and as such resignations were tendered five nominees of National Western were elected directors in lieu of the resigning directors.

14. The aforesaid conduct and acts of said eight directors including Defendants Charles Harris and Earl W. Kirchhoff who agreed to sell their shares and who resigned as aforesaid were a breach of trust and a violation of their duties as directors of Missouri Fidelity and National Western procured said resignations and therefor paid or has agreed to pay the said eight directors who resigned, including Defendants Charles Harris and Earl W. Kirchhoff and their friends and relatives as aforesaid a premium of about $1,200,000.

15. The aggregate amount paid by National Western for said shares purchased by it as aforesaid was approximately $1,200,000 in excess of the market value of

said shares and was a premium paid by it to said selling shareholders for the resignations of said directors who resigned as aforesaid and for the obtaining control of the executive committee and investment committee of Missouri Fidelity by National Western as aforesaid.

16. Upon information and belief Plaintiff states that the class of shareholders of Missouri Fidelity consists of more than 4,000 persons residing in different states, and the class is so numerous that it would be impractical for all of the members of the said class to join or be joined in this action, and Plaintiff brings this action on behalf of herself and all other shareholders of Missouri Fidelity similarly situated, and Plaintiff can and will adequately and fairly represent and protect the interest of the said class of shareholders of Missouri Fidelity.

The questions of law or fact herein are common to the said class, and the claims of Plaintiff herein are typical of the claims of the said class of shareholders of Missouri Fidelity.

The prosecution of separate actions by individual members of the said class would create a risk of inconsistent or varying adjudications with respect to individual members of the said class which would establish incompatible standards of conduct for the parties opposing the said class, namely, the Defendants herein.

The prosecution of separate actions by or against individual members of the said class would create a risk of adjudications with respect to individual members of the said class which would as a practical matter be dispositive of the interests of the other members of the said class not parties to the adjudications or subsequently impair or impede their ability to protect their interests.

17. By reason of the matters aforesaid and the wrongful conduct of the eight directors who participated therein

as aforesaid the said premiums of approximately $1,200,000 should be distributed to Plaintiff and the other shareholders of Missouri Fidelity similarly situated according to the shares held by them.

Wherefore, Plaintiff prays judgment as follows:

1. That the Court enter its Order determining that a class action shall be maintained herein.

2. That the Court enter judgment in favor of the Plaintiff and against the Defendants in the amount of $1,200,000, and that such judgment be entered in favor of Plaintiff and other shareholders of Missouri Fidelity in accordance with the shares of Missouri Fidelity held by them respectively, and that Plaintiff be allowed her reasonable attorneys fees and costs herein, and that the Court's judgment include and describe those whom the Court finds to be members of the class.

HYMAN G. STEIN,
CHARLES ALAN SEIGEL,
1117 International Building,
722 Chestnut Street,
St. Louis, Missouri 63101,
Telephone: CEntral 1-3443,
Attorneys for the Plaintiff.

Copy of the foregoing Amended Complaint mailed this 14th day of March, 1967, to Morris A. Shenker and Bernard Mellman, attorneys for Defendants, 408 Olive Street, St. Louis, Missouri 63102.

CHARLES ALAN SEIGEL.

MOTION OF DEFENDANTS EARL W. KIRCHHOFF AND CHARLES HARRIS TO DISMISS THE AMENDED COMPLAINT.

Oral Argument Requested.

(Filed in U. S. District Court on Mar. 27, 1967.)

The defendants move the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against this defendant upon which relief can be granted.

2. To dismiss the action on the ground that it purports to constitute a derivative shareholders action pursuant to the provisions of Rule 23.1 of the Federal Rules of Civil Procedure and does not comply with the provisions of said rule in that:

(a) The complaint is not verified.

(b) The complaint fails to set forth that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have.

(c) The complaint fails to allege with particularity the efforts, if any, made by the plaintiff to obtain the action she desires from the directors or other comparable authority.

(d) The complaint fails to allege with particularity the reasons for her failure to obtain the action or for not making the effort.

3. To dismiss the action because the complaint fails to join as defendants the other six directors referred to in paragraph twelve of the complaint, which directors are indispensable parties under Rule 19 of the Federal Rules of Civil Procedure and are not within the jurisdiction of

the Court, and further because the plaintiff has failed to set forth the names of the persons referred to in paragraph twelve of the complaint and the reasons they were not joined, contrary to the provisions of Rule 19 (c) of the Federal Rules of Civil Procedure.

4. To dismiss the action as one pleading a class action, if so for the reasons that:

(a) The person on whose behalf the action purports to be brought do not constitute a class, but on the contrary the interest of many of them are distinct and adverse.

(b) The plaintiff does not adequately represent all the other members of the alleged class, in that the interest of the plaintiff is not identical or co-extensive with the interests of other members of the alleged class, but are different therefrom and adverse thereto, and that certain other members of the alleged class have rights not possessed by the plaintiff.

(c) The claims of the plaintiff are not typical of the claims of all of the members of the alleged class.

5. To dismiss the action on the ground that the Court lacks jurisdiction as the amount in controversy is less than $10,000.00.

MORRIS A. SHENKER,
Attorney for Defendants,
408 Olive Street,
St. Louis 2, Missouri,
CH 1-6116.

A copy of the foregoing Motion to Dismiss and Memo mailed to Hyman G. Stein & Charles A. Seigel, Attorneys for Plaintiff, 722 Chestnut Street, St. Louis 1, Mo., this 24 day of March, 1967.

J. L. ZEMELMAN.

In the United States District Court,
Eastern District of Missouri,
Southeastern Division.

Margaret E. Snyder, also known as Peg Snyder,
Plaintiff,
vs.
Charles Harris and Earl W. Kirchhoff,
Defendants.
No. S 66 C 78.

Harper, Judge.

MEMORANDUM OPINION AND ORDER.

(Filed in U. S. District Court on April 27, 1967.)

This matter is before the court on the joint motion of the defendants to dismiss the amended complaint. The motion has been submitted on the briefs of the parties and oral argument.

The plaintiff seeks to bring this action as a class action pursuant to Rule 23, Federal Rules of Civil Procedure, as amended July, 1966. The relevant part of the amended complaint alleges that the plaintiff, Margaret E. Snyder, is a citizen of the State of Arizona, and the defendants, Charles Harris and Earl W. Kirchhoff, are citizens of the State of Missouri; that there is diversity of citizenship and the amount in controversy exceeds $10,000.00; that since prior to November 22, 1966, the plaintiff has been a shareholder of Missouri Fidelity/Union Trust Life Insurance Company (hereinafter referred to as Missouri Fidelity) and owns two thousand shares of said company; that the By-laws of Missouri Fidelity provide for a Board of Directors consisting of fifteen directors and that the defendants were at all times relevant to this action mem-

bers of said board of directors; that at all times relevant to this action the market price of Missouri Fidelity was about $2.63 per share; that sometime prior to November 22, 1966, National Western Life Insurance Company (hereinafter referred to as National Western) submitted to the directors of Missouri Fidelity a proposal to purchase from them for $7.00 per share all of the shares of Missouri Fidelity owned by them, conditioned however, that all directors of Missouri Fidelity, except four, resign as directors and that five nominees of National Western be elected as directors of Missouri Fidelity, and that such nominees be designated and elected as a majority of the executive committee and of the investment committee of Missouri Fidelity; that on or about November 22, 1966, National Western, pursuant to its said offer, entered into an agreement with eight of the directors of Missouri Fidelity, including the defendants herein, to pay to them and to friends and relatives of theirs $7.00 per share for an aggregate of approximately 300,000 shares of Missouri Fidelity owned by them, and thereupon and in pursuance of such conduct said eight directors, including the defendants herein, did resign as directors of Missouri Fidelity, and nominees of National Western were designated, named and elected as directors of Missouri Fidelity and as a majority of the executive committee and of the investment committee of Missouri Fidelity; that the aforesaid conduct and acts of the said eight directors, including the defendants, were a breach of trust and a violation of their duties as directors of Missouri Fidelity, and National Western procured said resignations and therefore paid or has agreed to pay the said eight directors who resigned, including the defendants herein, and their friends and relatives, a premium of about $1,200,000.00; and that the aggregate amount paid by National Western for the said shares was approximately $1,200,000.00 in excess of the market value of said shares and was a

premium paid by it to the said selling shareholders for the resignations of said directors who resigned and for the obtaining of control of the executive committee and investment committee of Missouri Fidelity.

The amended complaint prays for judgment in the amount of $1,200,000.00, said judgment to be entered in favor of the plaintiff and the other individual shareholders (allegedly over 4,000 in number) according to their respective share holdings.

The present motion alleges various grounds for dismissal of the amended complaint, including lack of jurisdictional amount. For reasons hereinafter set forth, this court need only consider the question of lack of jurisdictional amount.

The defendants contend that if the plaintiff has pleaded a class action, she has pleaded a "spurious" class action and that the jurisdictional amount in such an action may not be determined by aggregating the amounts which might be claimed by others in the class action. Further, the defendants contend that the plaintiff's individual claim can amount to no more than $8,740.00. The plaintiff, on the other hand, contends that since "spurious" class actions no longer exist under Rule 23, F. R. C. P., as amended July, 1966, and since a judgment in any class action is now binding upon the entire class, the claims of the entire class are in controversy and should, therefore, be aggregated in arriving at the jurisdictional amount.

The law concerning the aggregation of claims in a class suit before the amendment in July, 1966, to Rule 23, F. R. C. P., is fairly stated in Moore's Federal Practice, § 23.13, p. 3480, to-wit:

> "In the case of joinder of plaintiffs the matter of aggregation of claims is ruled by the doctrine of

Pinel v. Pinel (240 U. S. 594, 60 L. Ed. 817). There the rule was laid down that if the demands of the plaintiffs are 'separate and distinct', each must have a claim in the jurisdictional amount, while if they unite to enforce a joint or common interest aggregating is permissible. These principles apply with equal force in the class action, since the class action is but a procedural device to permit some to prosecute or defend an action without the necessity of all appearing as plaintiffs or defendants. Thus in the case of a true class action, if instead of bringing a class action the members of the class joined as plaintiffs, the jurisdictional amount would be determined by the joint or common claim; no one has a several claim. Unless the class suit were utilized all of the members of the class would have to join. Normally this is impracticable, and the class action device is employed; but the jurisdictional amount is determined in precisely the same manner, and aggregation is proper. In the hybrid and spurious class suit, on the other hand, the rights are several and there can be no aggregation, whether the parties all join or the class action is resorted to."

The so-called "spurious" class action under the old Rule 23 was where the character of the right sought to be enforced for or against the class was several, and there was a common question of law or fact affecting the several rights and a common relief was sought (See old Rule 23 (a) (3)). Any judgment in the spurious class action was binding solely on the named parties; it was in reality an invitation to join. By its very definition, the character of the rights sought to be enforced in a spurious class action were "separate and distinct," and, therefore, under the doctrine of Pinel v. Pinel, supra, such rights could not be aggregated to make up the jurisdictional amount.

Rule 23, as amended July, 1966, makes no provision for a spurious type of class action, and makes no reference to a "joint" or a "common" interest. The complaint alleges a breach of trust, and in paraphrasing the language of Rule 23 (b) (1), F. R. C. P., there is apparently an attempt to bring this action under such rule. However, since the prayer seeks direct individual damages for the respective shareholders of Missouri Fidelity, this action is more analogous to those situations contemplated by Rule 23 (b) (3), F. R. C. P. (See Notes of Advisory Committee on Rules following 28 USCA, Rule 23, as amended July, 1966.)

Rule 23 (b) (3), F. R. C. P., as amended July, 1966, provides, in part, to-wit:

> "(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> "(1) • • •
>
> "(2) • • •
>
> "(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular form; (D) the difficulties likely to be encountered in the management of a class action."

A judgment in a class action brought under Rule 23, as amended, is res judicata as to the whole class except as to those members of a (b) (3) type of class action who specifically request to be left out of the action.

Because a judgment in a class action is now binding upon the entire class, and because spurious class actions no longer exist under the amended Rule 23, does it necessarily follow that the doctrine with respect to jurisdictional amount of Pinel v. Pinel, supra, no longer applies to class actions? This court thinks not.

Pinel v. Pinel, supra, specifically states, l. c. 60 L. Ed. 818, in part, to-wit:

> "The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit, it is essential that the demand of each be of the requisite jurisdictional amount; but when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount" (Cases cited).

The Pinel doctrine applied with equal force to class actions brought under Rule 23 which was but a procedural device to allow several plaintiffs to unite in a single suit.

Rule 23, as amended, contains nothing to indicate that it has now become something more than a procedural device to permit several plaintiffs to unite in a single suit. The rule in no way purports to affect the jurisdiction of this court, nor do the Notes of the Advisory Committee on Rules indicate that the rule is to have such an effect. There is no reason why the Pinel doctrine should suddenly become obsolete with the passage of the amended Rule 23, unless the new rule somehow changes the character of a plaintiff's right. That it does not is clearly shown by the following excerpt from the Notes of the

Advisory Committee on Rules (see p. 62 of notes following 28 USCA, rule 23, as amended July, 1966), to-wit:

> "Subdivision (c) (2) makes special provision for class actions maintained under sub-division (b) (3). As noted in the discussion of the latter subdivision, the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivision (b) (3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request. A member who does not request exclusion may, if he wishes, enter an appearance in the action through his counsel; whether or not he does so, the judgment in the action will embrace him."

Furthermore, a construal of the amended Rule 23 in such a way as to confer jurisdiction on this court where in a similar situation before the amendment to the rule it would not have had jurisdiction, would constitute a direct violation of Rule 82, F. R. C. P., as amended, which states, in part:

> "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein."

See also DeLorenzo v. Federal Deposit Insurance Corp., 259 F. Supp. 193, l. c. 195, note 5.

The sole question before this court, then, is whether or not the demands of the plaintiff are separate and distinct from other persons in the class. If they are, then under the Pinel doctrine the plaintiff may not aggregate such claims with those of others in the class.

The allegations of the plaintiff's complaint clearly indicate that her claims are separate and distinct. The com-

plaint alleges that the plaintiff is the owner of 2,000 shares of stock of Missouri Fidelity; that the market price of said stock at the time of the matters complained of was approximately $2.63 per share; and that the defendants received $7.00 per share for their stock. The prayer asks for damages in the amount of $1,200,000.00, to be divided among the individual shareholders in accordance with their respective share holdings. Thus, the plaintiff is alleging that she is entitled to $8,740.00 damages for her own stock.

For the foregoing reasons the court finds that the amount in controversy in the present action does not exceed $10,000.00, and this court, therefore, lacks jurisdiction over the controversy. The defendants' joint motion to dismiss is sustained, and said cause is dismissed without prejudice.

ROY W. HARPER,
U. S. District Judge.

NOTICE OF APPEAL.

(Filed in U. S. District Court on May 25, 1967.)

Notice is hereby given that Plaintiff herewith appeals to the United States Court of Appeals for the Eighth Circuit from the Order of the United States District Court dated April 27, 1967 sustaining the joint motion of the Defendants to dismiss and dismissing Plaintiff's cause without prejudice.

HYMAN G. STEIN,
CHARLES ALAN SEIGEL,
1117 International Building,
722 Chestnut Street,
St. Louis, Missouri 63101,
Telephone: CEntral 3-3443,
Attorneys for the Plaintiff.

OPINION.

United States Court of Appeals
For the Eighth Circuit.

No. 18,881.

Margaret E. Snyder, Also Known as Peg Snyder,
Appellant,
v.
Charles Harris and Earl W. Kirchhoff,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

[February 27, 1968.]

Before Van Oosterhout, Chief Judge; Matthes, Circuit Judge, and Harris, District Judge.

Per Curiam.

Plaintiff, appellant herein, filed this class action pursuant to amended Rule 23, Fed. R. Civ. P., effective July 1, 1966.

Upon motion of the defendants the district court, Honorable Roy W. Harper, Chief Judge, dismissed the action on the ground that the damages claimed by appellant, exclusive of interest and costs, did not exceed the $10,000.00 jurisdictional amount requisite for diversity jurisdiction under 28 U. S. C., § 1332. *Snyder v. Harris,* 268 F. Supp. 701 (E. D. Mo. 1967).

The pertinent allegations of the complaint are fully incorporated in Judge Harper's opinion and need not be restated here.

The sole question for determination is whether amended Rule 23 allows the plaintiff in a class action to aggregate her claim with those of other class members whom she represents for purposes of satisfying the jurisdictional amount under Section 1332.

Appellant cites no authority in support of her position, except the suggestion of Professor Charles Alan Wright in 2 Barron & Holtzoff, Federal Practice and Procedure, § 569 (Supp. 1967, at 106) that it would be convenient to hold that since a judgment rendered in a class action is binding under the amended rule on the entire class, the claims for or against the whole class are in controversy and therefore should be aggregated to satisfy the jurisdictional amount. We are not persuaded from our study of amended Rule 23 and the Advisory Committee notes to conclude that the amendment of the Rule was designed to or did in fact change the substantive law proscribing the aggregation of separate and distinct claims in a class action for purposes of conferring jurisdiction under Section 1332.

On the basis of the district court's soundly reasoned opinion and the opinion of the Fifth Circuit in *Alvarez v. Pan American Life Insurance Company*, 375 F. 2d 992 (5th Cir. 1967), *cert denied*, 389 U. S. 827 (1967), we affirm.

A true copy.

Attest:
Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT.

(Filed February 27, 1968.)

United States Court of Appeals
For the Eighth Circuit.

No. 18,881. September Term, 1967

Margaret E. Snyder, also known as Peg Snyder, Appellant, vs. Charles Harris and Earl W. Kirchhoff.	Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Order of the said District Court sustaining Motions of Defendants to dismiss and dismissing this cause without prejudice, be, and the same is hereby, affirmed.

February 27, 1968.

Order entered in accordance with Per Curiam Opinion:

ROBERT C. TUCKER,
Clerk, U. S. Court of Appeals
for the Eighth Circuit.

In the
United States Court of Appeals
For the Eighth Circuit.

No. 18,881.

Civil.

In the Matter of
Margaret E. Snyder, Also Known as Peg Snyder,
Appellant,

vs.

Charles Harris and Earl W. Kirchhoff,
Appellees.

Appeal From the United States District Court for the
Eastern District of Missouri.

PETITION
For Rehearing, or, in the Alternative, to Transfer to the Court En Banc.

(Filed March 14, 1968.)

Now comes the above named Appellant in the above entitled cause and respectfully presents and files this, her Petition for Rehearing, or, in the Alternative, to Transfer to the Court en banc, and as grounds and reasons therefor, and in support thereof, respectfully states that:

1. This cause was argued before this Honorable Court on January 19, 1968 and the decision and opinion of this Court herein was rendered and entered on February 27, 1968.

2. On February 23, 1968, in the case of The Gas Service Company v. Coburn, etc., not yet reported in the Federal Reporter and which was reported in the March 5, 1968 issue of The United States Law Week and which did not come to the attention of Appellant or her attorneys until after such publication, the United States Court of Appeals for the Tenth Circuit rendered a decision which is pertinent in this case on a controlling matter of law as hereinafter more fully stated. Inasmuch as The Gas Service Company v. Coburn was decided only four days before the decision of this Court herein and has not been reported in the Federal Reporter and the decision of this Honorable Court herein was rendered prior to the reporting of The Gas Service Company v. Coburn in the March 5, 1968 issue of The United States Law Week, Appellant respectfully suggests and states that said decision of the United States Court of Appeals for the Tenth Circuit was overlooked by this Honorable Court or had not come to this Court's attention at the time of its decision herein.

3. In its Opinion and decision rendered herein on February 27, 1968 this Honorable Court affirmed the decision of the United States District Court in dismissing this action for lack of satisfying the jurisdictional amount under Section 1332, U. S. C., holding that the Plaintiff (Appellant) could not under Amended Rule 23 aggregate her claim with the claims of other class members.

4. In its Opinion herein this Honorable Court stated, inter alia:

> "Appellant cites no authority in support of her position, except the suggestion of Professor Charles Alan Wright in 2 Barron & Holtzoff, Federal Practice and Procedure, Sec. 569 (Supp. 1967 at 106), that it would be convenient to hold that since a judgment rendered in a class action is binding under the amended rule on the entire class, the claims for or against the

whole class are in controversy and therefore should be aggregated to satisfy the jurisdictional amount.

* * * * * * * *

"On the basis of the district court's soundly reasoned opinion and the opinion of the Fifth Circuit in **Alvarez v. Pan American Life Insurance Company**, 375 F. 2d 992 (5th Cir. 1967), **cert. denied**, 389 U. S. 827 (1967), we affirm."

5. In **The Gas Service Company v. Coburn**, supra, the United States Court of Appeals for the Tenth Circuit expressly held that even though the claims of the individuals constituting the class in the case there presented were neither "joint" nor "common" yet under Rule 23, Fed. R. Civ. P., as amended in July 1966, the claims of the entire class were in controversy and could be aggregated for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U. S. C., § 1332. With respect to the decision of the United States Court of Appeals for the Fifth Circuit in **Alvarez v. Pan American Life Insurance Company**, 375 F. 2d 992, relied on by this Honorable Court in the instant case, the Tenth Circuit stated: "We must respectfully disagree * * *".

A copy of the United States Court of Appeals for the Tenth Circuit of **The Gas Service Company v. Coburn Opinion**, is set forth in full in the Appendix hereto.

6. For the reasons hereinabove set forth Appellant respectfully states that this Honorable Court has overlooked a controlling matter of law and fact as set forth in the decision of the United States Court of Appeals for the Tenth Circuit in **The Gas Service Company v. Coburn**, *supra.*

7. The question and issue herein involved is of great importance in the administration of justice and is a matter of great importance with respect to the interpretation

and application of Rule 23 of the Federal Rules of Civil Procedure as amended in July 1966.

Wherefore, for the reasons stated above, Appellant respectfully requests and petitions that a rehearing be granted herein or, in the alternative, that this matter be transferred to the Court En Banc, and that on such rehearing or transfer, the judgment and order of the United States District Court be reversed.

Respectfully submitted,

/s/ HYMAN G. STEIN,
/s/ CHARLES ALAN SEIGEL,
HYMAN G. STEIN,
CHARLES ALAN SEIGEL,
722 Chestnut Street,
St. Louis, Missouri 63101,
Attorneys for Appellant.

Certificate of Counsel.

Hyman G. Stein and Charles Alan Seigel, attorneys for the above named Appellant, hereby certify that they have read and are familiar with and understand the contents of the above and foregoing Petition for Rehearing, Or In The Alternative, To Transfer To The Court En Banc, and that said Petition is submitted in good faith and is believed by them to be meritorious and said Petition is not presented for the purpose of delay or vexation.

/s/ Hyman G. Stein,
/s/ Charles Alan Seigel,
Hyman G. Stein,
Charles Alan Seigel,
Attorneys for Appellant.

APPENDIX.

United States Court of Appeals,
Tenth Circuit.

January Term, 1968.

The Gas Service Company,
Appellant,
v.
Otto R. Coburn, on behalf of himself and all others similarly situated,
Appellee.
No. 9635.

Appeal from the United States District Court for the District of Kansas.

Gerit H. Wormhoudt (Robert L. Coleman, Kirke W. Dale and Paul R. Kitch were with him on the brief) for Appellant.

William V. Crank (D. Arthur Walker, Richard E. Cook, George B. Collins, Robert Martin, K. W. Pringle, Jr., W. F. Schell, Robert M. Collins, W. L. Oliver, Jr., Tom C. Triplett, Thomas M. Burns and Peter J. Wall were with him on the brief) for Appellee.

Before Woodbury*, Lewis and Hickey, Circuit Judges.

Lewis, Circuit Judge.

This is an interlocutory appeal authorized in compliance with 28 U. S. C., § 1292 (b), to allow appellate com-

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* Of the First Circuit, sitting by designation.

sideration of an order of the District Court for the District of Kansas denying appellant's (defendant's) motion to dismiss appellee's (plaintiff's) complaint for lack of jurisdiction. The determinative question is whether under Rule 23, Fed. R. Civ. P., as amended in July 1966, aggregation of several and distinct claims is permitted for the purpose of satisfying the diversity jurisdictional amount requirement of 28 U. S. C., § 1332, where a class action under the amended rule is otherwise appropriate.

This action was brought by plaintiff, on behalf of himself and all others similarly situated, against defendant to recover back all amounts allegedly unlawfully charged by defendant for gas sold to customers for consumption outside the city limits of various Kansas municipalities. Defendant's charges are said to be revenues on city franchise rights imposed in addition to a volume charge for gas and are alleged to have been arbitrarily extended and charged to customers residing outside city limits. Plaintiff is such a customer and is one of a class of more than 18,000 other customers similarly situated. The complaint contains conclusionary allegations that joinder of the numerous class members is impractical, that plaintiff's claim is typical of the claims of the class members, that questions of law and fact are common to the class, that the action will fairly and adequately protect the interests of the class, and that the action is cognizable under Rule 23. It is conceded that neither plaintiff nor any member of the class has an individual claim exceeding $10,000, and that such individual claims are variable in amount[1] but would aggregate to more than $10,000.

The trial court found, and it seems indisputable, that plaintiff's action definitely meets each prerequisite to a

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[1] By affidavit in support of the motion to dismiss, defendant asserts that the total collected from plaintiff for franchise taxes was $7.81.

class action as presently set out in Rule 23(a) and one or more of the additional requirements of 23(b).[2] The class is numerous, a single question of law is presented com-

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[2] The amended Rule 23 provides in part:

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the

mon to the class, the claim of the class and any defense thereto is typical, and the interests of the class will be adequately protected. So, too, it is apparent that a class action is superior to other available methods for a fair and efficient adjudication of the controversy. The class has a high degree of cohesion and the stake of each individual is so small that separate suits are obviously impractical. In mixed terms, it may be said that pragmatically the case presents an ideal class action.

Because the claims of the individuals constituting the class in the case at bar are neither "joint" nor "common" this action under Rule 23 before amendment[3] would not have been classified as a "true" class action and aggregation of claims would not have been permitted. See Aetna Ins. Co. v. Chicago, Rock Island & Pac. R. R., 10 Cir., 229 F. (2) 584. The Fifth Circuit in Alvarez v. Pan American Life Ins. Co., 375 F. (2) 992, has held that this result is still dictated after adoption of the new rule. Citing Clark

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desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

[3] The rule then provided in pertinent part:

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

v. Paul Gray, Inc., 306 U. S. 583, and in reliance upon the compulsion of Rule 82, Fed. R. Civ. P.,[4] the Fifth Circuit reasoned that to hold otherwise would result in the expansion of federal jurisdiction, as Judge Bell aptly phrases it, in "a *sub silentio* manner." 375 F. (2) at 995. We must respectfully disagree.

It is true, of course, that the rule-making power does not include the right to create or abrogate substantive law and that as a consequence no rule can lift or lower the $10,000 restriction upon federal jurisdiction. But it has long been established that the jurisdictional amount may be met by aggregation when the matter in controversy is of the required value. In Gibbs v. Buck, 307 U. S. 66, 72, the Supreme Court stated it thus:

> ". . . federal jurisdiction will be adequately established, if it appears that for any member, who is a party, the matter in controversy is of the value of the jurisdictional amount, or, if to the aggregate of all members in this representative suit, the matter in controversy is of that value."

Rule 23 before or after amendment does not purport to affect this principle.

The amendment to Rule 23 did contemplate very comprehensive change in the procedural aspects of class suits and to effectuate such change many guidelines set down in earlier judicial rulings must now be questioned in application of the amended rule.[5] The Advisory Com-

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[4] "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. . . ."

[5] Clark v. Paul Gray, Inc., 306 U. S. 583, may well be such a case and certain it is that the Fifth Circuit so considered it. However the Supreme Court seems to have there rejected the factual background as supporting a class action at all and for reasons that would be equally applicable for the dismissal of that case under the amended rule.

mittee's Note, 39 F. R. D. 98, places great emphasis on the fact that the amended rule is intended to eliminate the nice judicial distinctions and concomitant case law confusion that had arisen from a classification of class actions as "true", "hybrid", and "spurious". "In practice", said the Committee, "the terms 'joint', 'common', etc., which were used as the basis of the [old] Rule 23 classification proved obscure and uncertain." These terms were eliminated in the amendment and a purely pragmatic classification was adopted. The rule now recognizes that the procedural tool of a class action must be workable if it is to be desirable. To now hold that the former classifications of "true", "hybrid" and "spurious" must be perpetuated to allow or defeat aggregation would seem to render the rule sterile in that regard.

We find comfort for our view in Provident Bank v. Patterson, ... U. S. ...., decided January 29, 1968, wherein Mr. Justice Harlan, writing for a unanimous Court, considers amended Rule 19 and rejects the following argumentative syllogism: "(1) there is a category of persons called 'indispensable parties'; (2) that category is defined by substantive law and the definition cannot be modified by rule; (3) the right of a person falling within that category to participate in the lawsuit in question is also a substantive matter, and is absolute." Similarly we believe the elimination of categories of class actions in Rule 23 involves no substantive change and is no bar to the application of aggregation of claims to establish monetary jurisdiction. The basic jurisdictional question is whether aggregation under **any** circumstances can meet the legislative mandate pertaining to the monetary restriction on federal jurisdiction. This question has been answered in the affirmative, Gibbs v. Buck, *supra*, and it follows, under the new rule that when a cause clearly falls within its

terms as a class action, as here, the claims of the entire class are in controversy.[6]

The judgment is affirmed and the cause remanded for further proceedings.

ORDER.

United States Court of Appeals
for the Eighth Circuit.

No. 18881

Margaret E. Snyder, also known as Peg Snyder,
Appellant,

vs.

Charles Harris and Earl W. Kirchoff.

Appeal from the United States District Court for the Eastern District of Missouri.

Petition of appellant for rehearing or in the alternative transfer to the Court en banc in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

March 22, 1968.

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[6] Professor Wright considers this to be a realistic view. He states:

> "The amended rule nowhere refers to a 'joint' or a 'common' interest. It would be convenient if it should be held that, since the judgment is binding under the amended rule on the entire class, the claims for or against the whole class are in controversy. This would be an entirely realistic view, and one entirely consonant with the stated purpose of the amount in controversy requirement. . . ."

ORDER.

United States Court of Appeals
for the Eighth Circuit.

No. 18881

Margaret E. Snyder, also known as Peg Snyder,
Appellant,

vs.

Charles Harris and Earl W. Kirchoff.

Appeal from the United States District Court for the
Eastern District of Missouri.

On consideration of the motion of appellant for a stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, stayed to and including May 1, 1968. If within this period of time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

March 27, 1968.

ORDER.

United States Court of Appeals
for the Eighth Circuit.

No. 18881

Margaret E. Snyder, etc.,
Appellant,

vs.

Charles Harris, et al.

Appeal from the United States District Court for the Eastern District of Missouri.

On consideration of the motion of appellant for a further stay of the mandate in this cause pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the mandate herein be, and the same is hereby, further stayed to and including May 20, 1968. If within this period of time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the further stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

April 25, 1968.

Supreme Court of the United States.

October Term, 1968.

No. 109.

Margaret E. Snyder,
Petitioner,

v.

Charles Harris and Earl Kirchhoff.

ORDER ALLOWING CERTIORARI.

(Filed October 21, 1968.)

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

A true copy.

Test:

John F. Davis,
Clerk of the Supreme Court of the United States,
By B. P. Cullen, Chief Deputy.